

HON'BLE SRI JUSTICE M.S.K.JAI SWAL

A.S.No.1024 of 2016

JUDGMENT:

The appellant is the claim petitioner having filed E.A.No.214 of 2016 in E.P.No.10 of 2013 in O.S.No.153 of 2012 on the file of the Principal Senior Civil Judge, Ranga Reddy District. He filed the application under Order 21 Rule 58 read with 47 C.P.C., to uphold the claim of the petitioner to the extent of half share in the schedule property namely Flat No.404 in 4<sup>th</sup> floor with undivided share of 30 Sq.Yds. in Sri Krishna Paradise, situated at Satyanarayanapuram, adjacent to Chaitanyapuri, Gaddi Annaram village, Saroornagar Mandal, Ranga Reddy District, and raise the attachment effected on 21.01.2014 over the half extent pursuant to Orders in E.P.No.10 of 2013.

2. By order, dated 28.09.2016, the learned Senior Civil Judge held that the property was attached before judgment as per orders in I.A.No.486 of 2012 and the gift-deed was executed after the attachment so as to defeat the rights of the decreeholder, that the said transfer by the judgment-debtor in favour of the claim petitioner is fraudulent and also holding that the present application is filed only to drag on the execution proceedings. The Executing Court having dismissed the claim petition, the present appeal is filed.

3. The contention of the appellant is that the Executing Court has not disposed of the application filed under Order 21 Rule 58 C.P.C. as per the requirement, that no enquiry was held, that no opportunity was afforded, that even though the learned Judge has held that the petition is also not maintainable in view of the proviso to sub-rule (1) of Rule 58 of Order 21 C.P.C., the learned Judge has recorded findings that the said transfer of the attached property in favour of the claim petitioner by the judgment-debtor is

fraudulent since it is subsequent to the attachment before judgment. He further contends that this observations of the learned Judge is erroneous since there was no attachment before the gift-deed was executed, which was on 30.10.2012 whereas the attachment was effected only on 21.01.2014.

4. Learned Counsel appearing for the appellant submits that the Court below has erred in delivering the findings without affording opportunity and has summarily rejected the claim petition which is contrary to the provisions of law as well as catena of authorities on the subject.

5. On the other hand, learned Counsel appearing for the decreeholder submits that the intention of the judgment-debtor and the claim petitioner, who are father and son, is to delay and defeat the claim of the decreeholder, that the schedule property was attached before judgment long prior to the alleged gift-deed and hence the Court below has properly taken into consideration the above conduct of the judgment-debtor in transferring half of his share in the attached property in favour of his son. Learned Counsel submits that the order does not suffer from any irregularity and it cannot be interfered with.

6. The facts leading to the present appeal may briefly be noticed. The appellant is the third party claim petitioner. The first respondent is the decreeholder and the second and third respondents are the judgment-debtors. R.2 and R.3 are husband and wife and the claim petitioner is their son. Decreeholder filed O.S.No.153 of 2012 on the file of the Senior Civil Judge, Gooty, for recovery of money. The second respondent was the defendant. He was set *ex parte* in the suit. His attempt to set aside the *ex parte* decree proved futile. Pending disposal of the suit, the decreeholder filed I.A.No.486 of 2012 under Order 38 Rule 5 C.P.C., for attachment before judgment., The same was ordered and the warrant was sent to the District

Court at Ranga Reddy District, since the defendant was resident within that District. The said warrant was returned by the District Court at Ranga Reddy District, with the following endorsement:-

“Report:- I, B.S.N.Murthy, F.A., Dist.Court, R.R.Dist., Hyderabad., that I state on oath that I have received ABJ Order, notice and summons for service from Nazarath.

I went to the given address which was shown in ABJ and the respondent was present and wife also present and I explained about the ABJ Order.

The respondent refused to receive the ABJ and I, affixed one copy to Dist. Court Notice Board and notice and summons to respondents door.

Hence, the ABJ Order refused and report submitted.”

7. Subsequently, the suit was decreed and the decreeholder made a request to the trial Court at Gooty to transfer the decree to Ranga Reddy District which was acceded to. Accordingly, E.P.No.10 of 2013 was filed in the District Court, Ranga Reddy District. A warrant of attachment was ordered and executed on 21.01.2014 pursuant to the order dated 11.12.2012 in E.A.No.27 of 2013. Thereafter, the claim petitioner filed the application contending that half of the schedule property was gifted to him by judgment-debtor by executing registered gift-deed bearing No.5944 of 2012, dated 30.10.2012. With effect from that date, he became the owner of 50% of the schedule property which is attached and proposed to be sold in execution of the decree for recovery of money, which is obtained by the decreeholder against the judgment-debtor.

8. The Executing Court has disposed of E.A.No.214 of 2016 filed under Order 21 Rule 58 C.P.C., without holding a full fledged enquiry as contemplated under the provisions of Code of Civil Procedure. Para 7 of the order impugned in the appeal can usefully be extracted.

“The objections raised by the decreeholder is that the property was already attached as per orders in I.A.No.486 of 2012 having knowledge about the attachment, the gift deed was executed by 1<sup>st</sup> judgment-debtor and his wife in favour of the 2<sup>nd</sup> judgment-debtor. As 2<sup>nd</sup> judgment-debtor is a universal donee liable to discharge the debt. For that reason, 2<sup>nd</sup> judgment-debtor was impleaded as a party. The arguments addressed by the Counsel for the decreeholder, stating that the 2<sup>nd</sup> judgment-debtor is liable to discharge the decreetal amount as an universal Donee. On perusal of the record it is clear that the schedule property was attached before judgment as per orders in I.A.No.486/12 the gift deed was executed after the attachment, then it is clear that with a view to defeat the rights, of the creditor the judgment-debtor, fraudulently transferred the property in favour of the 2<sup>nd</sup> judgment-debtor, for that reason only as per orders in E.A.No.66 of 2013, 2<sup>nd</sup> judgment-debtor was impleaded in EP proceedings. There is no document filed by either by the petitioner in this petition or the 3<sup>rd</sup> respondent, in E.A.No.23/16 that the mother is having capacity to purchase the property even the sale deed also do not disclose about the sale amount invested by the mother. The mother of the petitioner filed E.A.No.23/16 U/o.21 R.58 to raise the attachment in respect of her half share the said petition was dismissed stating that she has no capacity to purchase the property and she already gifted the property even as per the document after dismissal of the said petition now the petitioner again filed this petition to raise the attachment in respect of the half share of the mother. Hence, E.A.No.23/16 was already dismissed and there is a finding in E.A.No.66/13 that the petitioner is the universal donee. In such circumstances, it is clear that the 1<sup>st</sup> judgment-debtor purchased the property and after passing of attachment orders in I.A.No.486 of 2012 fraudulently transferred by way of gift deed in favour of the petitioner. In such circumstances, the present petition is filed only to drag on the E.P. proceedings. Even as per the provisions of U/o.21 Rule 58(1) proviso (b) provided that no such claim or objection shall be entertained where the Court considers that the claim or objection was designedly or unnecessarily delayed. Hence, it is clear that there is no ground to raise the attachment. Hence, there are no merits in the petition. Petition dismissed.”

9. It is evident from the above that the Executing Court has not only dismissed the claim petition under the proviso (b) to sub-rule (1) of Rule 58

of Order 21 C.P.C., which can be invoked if the Court considers that the claim or objection was designedly or unnecessarily delay but also considered the merits of the case, more particularly, the Court took into consideration the aspect that while the schedule property was attached pursuant to orders in the application filed under Order 38 Rule 5 C.P.C. in I.A.No.486 of 2012, that the registered gift deed was on 30.10.2012 and therefore since the execution of gift deed is subsequent to the attachment, the same cannot be looked into.

10. This observation of the learned Senior Civil Judge is seriously contested on the ground that the attachment of the schedule property was not effected on 30.12.2012 by the Field Assistant of Ranga Reddy District, but the attachment was made only on 21.01.2014 pursuant to the orders of the Executing Court in E.A.No.27 of 2013 dated 11.12.2013, which is long after the judgment-debtor executed the gift deed in favour of the claim petitioner. Learned Senior Civil Judge has given findings even without their being proper material on record.

11. There is no gain saying the fact that any application made under the provisions of Order 21 Rule 58 C.P.C., need to be adjudicated after affording reasonable opportunity to the parties to substantiate their claim. In E.VENKATESWARA RAO v. S.NAGABHUSHANAM AND ANOTHER<sup>1</sup>, this Court held as under in paras 2 and 3:-

“It is the case of the petitioner that though his application is filed under Order 21 Rule 58 C.P.C., in the nature of claim petition raising objection to the attachment in question, which calls for an enquiry as contemplated under sub-rule (2) of Rule 58 of Order 21 C.P.C., which says that all questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this Rule or relevant to the adjudication of the claim or objection shall be determined by the Court dealing with the claim or

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<sup>1</sup> 2000 (4) ALT 434

objection and not by a separate suit. Thus, enquiry under this application has virtually been made as that of a suit. In view of such change brought in by law, it necessitates an enquiry to be conducted by the Court, without which neither the parties can have any opportunity to substantiate their claim. Admittedly in this case no enquiry was conducted and neither of the parties have been given any opportunity to prove their claim. In that view of the matter, the order under revision is set aside.

The revision is, therefore, allowed. The lower Court is directed to dispose of the impugned application afresh after conducting enquiry and giving an opportunity of being heard to both the parties, within a period of three months from the date of receipt of a copy of this order. It is needless to observe that the articles under attachment be kept in the custody of the Court below under lock and seal and if the respondent wants the same to shift to any other place, the same may also be under the control of the Court below under lock and seal and same shall continue till disposal of the application. No costs.”

12. Similarly in another decision of our High Court in **MUVVALA RAMACHNADRA RAO AND ANOTHER v. KURCHETI RAVI AND ANOTHER**<sup>2</sup>, the facts of which are similar to the facts of the case in hand. This Court held as under in paras 12:-

“From what is stated above, it does not appear that the executing Court had dismissed the objection under Clause (b) of proviso to sub-rule (1) of Rule 58 of Order 21 of the Code, that is to say only on the ground that the claim was designedly or unnecessarily delayed. Because a finding has been recorded that the agreement of sale in question is not genuine, the order passed must be held to have been passed under sub-rule (2) of Order 21 Rule 58 of the Code of Civil Procedure without holding an enquiry and without giving opportunity to the parties to the objection, but it has straightaway passed the order on merits which, on the face of it, is contrary to the mandatory provisions stated above. Under these circumstances, the impugned order suffers from material irregularity in exercise of its jurisdiction.”

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<sup>2</sup> 1999 (3) ALD 101

13. For the sake of convenience, Rule 58 of Order 21 of the Code of Civil Procedure can be reproduced. It reads as under:-

“(1) Where any claim is preferred to or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained –

- (a) where, before the claim is preferred or objection is made, the property attached has already been sold; or
- (b) where the Court considers that the claim or objections was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall in accordance with such determination, -

- (a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or
- (b) disallow the claim or objection; or
- (c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or
- (d) pass such order as in the circumstances of the case it deem fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.”

14. A perusal of the above provision, coupled with the decisions referred to above, leave no room for doubt that a proper enquiry needs to be conducted in a claim petition filed by a third party and the same cannot be

summarily disposed of. In the instant case, there was a factual controversy. It may be recalled that when the suit was pending at Gooty, an Order under 38 Rule 5 C.P.C., for attachment before judgment was made and the order was sent to Ranga Reddy District Court for execution. The same has been returned with the endorsement referred to above. What happened subsequent thereto is not on record. The suit was decreed by the Court at Gooty and that decree was transferred to Ranga Reddy District. Thereafter, E.P. was filed. Steps were taken for the sale of schedule property. E.A.No.27 of 2013 was filed by the decreeholder. This was disposed of on 11.12.2013 and the E.P. schedule property was attached. Rule 54 warrant was issued. The same was executed on 21.01.2014.

15. In view of the above, the matter that needs to be adjudicated is as to whether the property which is sought to be sold in execution was attached on 30.12.2012 or on 21.01.2014 since the claim petitioner claims that half of the schedule property was gifted to him by the judgment-debtor by executing the registered gift deed on 30.10.2012. This matter needs to be enquired into. The learned Senior Civil Judge has proceed on the presumption that the schedule property was attached in October, 2012 whereas the gift deed was subsequent thereto which was obtained fraudulently.

16. A perusal of the entire material on record leaves no room for doubt that the learned Senior Civil Judge has dismissed the claim petition not only under the proviso (b) of sub-rule (1) of Order 21 Rule 58 but also on merits, but without there being any enquiry there for as contemplated. Therefore, it is a fit case where the matter is remanded back to the Executing Court to adjudicate the claim of the claim petitioner in E.A.No.214 of 2016 after affording opportunity to both the parties to prove their respective contentions. However, it is needless to clarify that the very claim of the claim

petitioner is half share in the schedule property which is sought to be sold in execution of the decree. He has no claim for the remaining half. The suit property has been valued at more than Rs.15,00,000/-. The claim of the decreeholder is about Rs.8,00,000/-. The claim petitioner in his application prayed for raising the attachment to the extent of half share in the schedule property. Since there is no claim with regard to the remaining half, the executing Court is at liberty to proceed with the execution of the decree insofar as the remaining half share in the schedule property is concerned, pending adjudication of his claim petition.

17. In the result, the appeal is allowed. The Order under appeal is set aside and the matter is remanded back. Further more, the executing Court is at liberty to take further steps for executing the warrant in E.P.No.10 of 2013 insofar as the remaining 50% of the schedule property is concerned.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

7<sup>th</sup> February, 2017  
smr

M.S.K.Jaisw al, J

